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AUTHOR Van Alstyne, Arvo
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ABSTRACT

Issues pertaining to the Bakke case and to college admissions in general are considered. Three major viewpoints concerning admissions are as follows: whether reserving a fixed number of seats in the entering class for designated minority candidates to programs that are federally supported violates Title VI of the Civil Rights Act of 1964; whether the use of race and ethnicity as nondecisive factors to be considered in a flexible admissions program, which also takes many other circumstances into account, is valid as a means for producing diversity among the students in an educational program that is federally supported; and whether race and ethnicity may be used as decisive factors in the admissions process, without violation of the Equal Protection Clause, if responsible legislative, administrative, or judicial bodies have determined that this approach is necessary to remedy specific prior discriminatory practices of the institution. Some relevant legal and constitutional issues that need to be addressed include the following: whether the Bakke decision applies to educational programs that receive no direct federal support, merely because other programs within the same institution do receive such support, or federal financial aid is available to students in attendance there; and whether the Bakke case suggests a judicial tolerance for more discretion and less rigidity in the admissions process, thus paving the way for imaginative and more flexible approaches short of strict racial quotas. It is concluded that (1) if an institution wishes to adopt a racially sensitive admissions program, it must be prepared to articulate the precise manner in which the structure and criteria used serve the stated objectives of the program; and (2) the Bakke case appears to suggest that the greatest opportunity for vigorous affirmative action program lies in legislative hands. (SW)

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ARVO VAN ALSTYNE

Professor of Law and
Vice President-Executive Assistant
University of Utah

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FROM DISCRIMINATION TO AFFIRMATIVE ACTION

by Arvo Van Alstyne
Professor of Law and
Vice President-Executive Assistant
University of Utah

The Bakke decision, for persons of reflective disposition, is circumscribed by subtle ironies. The issue is not new. In 1848, when Harvard College proposed to admit one Negro student, President Edward Everett reportedly responded to a storm of protests by saying that "if this boy passes the [entrance] examinations, he will be admitted; and if the white students choose to withdraw, all of the income of the college will be devoted to his education."

Four decades ago, the thrust of the relevant litigation over professional educational admission standards concerned the validity of institutional policies to exclude under the excuse of "separate but equal facilities," qualified students, from all-white law schools and graduate programs, because they were black. Today, the issue is reversed: may qualified applicants be admitted to graduate and professional education because they are black (or Chicano or Asian or Native American)?

To put the point of Bakke this way, I submit, illustrates how far we, as a society have come -- albeit with all deliberate speed and frustratingly disparate results -- during that period of time. Few persons, however, would be so rash as to suggest that the uneven and halting progress of the past several decades has overcome the preceding centuries of deliberate oppression and calculated indifference to the rights of minorities in our society.

A more visible degree of public sensitivity to racial problems has been developing, however, emanating in part from moral imperatives but perhaps more importantly from demonstrative activism and political initiatives by minority communities throughout the nation. That sensitivity has been manifested in seminal court decisions that have reinvigorated basic human values implicit in constitutional language. It has brought forth epochal legislation, after a century of Congressional indifference, in the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Fair Housing Act of 1968, and the Equal Employment Opportunity Act of 1972. And it has focussed the attention of public officials and educators upon the pragmatic, as well as theoretical, issues of remedies.

In the context of the concerns of the present conference, the remedial debate all too easily degenerated into a semantic squabble revolving about fine-spun distinctions relating to the meaning of such terms as "quotas," "goals," "reverse discrimination," "suspect classification criteria," "affirmative action programs," and "preferential admissions" programs for "disadvantaged" students. The Supreme Court's decision in Bakke, despite its many shortcomings, has at least cut through much of the rhetoric to establish three cardinal points of departure for future progress toward racial justice:

(1) The reservation of a fixed number of seats in the entering class for designated minority candidates to programs which are federally supported violates Title VI of the Civil Rights Act of 1964.

(2) The use of race and ethnicity as nondecisive factors to be considered in a flexible admissions program, which also takes many other circumstances into account, is valid as a means for producing diversity among the students in an educational program that is federally supported.

(3) Race and etnnicity may be used as decisive factors in the admissions process, without violation of the Equal Protection Clause, if responsible legislative, administrative, or judicial bodies have determined that this approach is necessary to remedy specific prior discriminatory practices of the institution.

Beyond these three points, the legal effect of Bakke is clouded. But it is worthy of special note that not one justice disagreed with Justice Powell's point that race and ethnic origin may, at least under some circumstances and for some purposes, be taken into account in the admissions process. On the other hand, it is equally true that not one justice agreed with Justice Powell's views that, on the record before the court, the only asserted objective which would permit such consideration of race was the "student body diversity" objective. Four justices, you will recall, refused to discuss the point, believing it to be irrelevant; four others expressed the view that the Constitution permitted a far more expansive use of racial elements than Justice Powell was prepared to allow.

John F. Kennedy spoke to the nation as President of the United States, on June 11, 1963, the evening following the showdown at

the entrance to the University of Alabama when Governor Wallace stepped aside and permitted two blacks to enter that institution pursuant to a court order. In his address, the President appealed for national support for a comprehensive Civil Rights Act -- legislation that ultimately was enacted the following year as a memorial to his assassination in Dallas. He said, in part:

> ". . . not every child has an equal talent or an equal ability or an equal motivation, but they should have the equal right to develop their talent and their ability and their motivation to make something of themselves. We have a right to expect that the Negro community will be responsible, will uphold the law, but they have the right to expect that the law will be fair; that the Constitution will be colorblind, as Justice Harlan said at the turn of the century."

One of the major lessons of Bakke, however, is that the Constitution need not be colorblind, and that race and ethnic origin are facts of life that cannot and need not be disregarded in the pursuit of social justice. Affirmative action, properly understood not to consist of fixed numerical quotas or ratios but as a vigorous effort to recruit and admit students who are found to be qualified upon assessment of their personal characteristics and experiences, including racial and ethnic background, has been given clear judicial approval. In this sense, Bakke represents, I submit, an opportunity and a challenge to the higher educational community.

To say this is not to overlook or minimize the difficulties presented by Bakke. There are many relevant legal and constitutional issues still dangling, inextricably intertwined into a Gordian knot which only future litigation, or possibly legislation, can cut through. Let me review a few of these points:

(1) The proper interpretation of Title VI is still unresolved by Bakke. It is not clear whether the decision, based on Title VI, applies to educational programs that receive no direct federal support, merely because other programs within the same institution do receive such support, or federal financial aids are available to students in attendance there. This issue, which may be of critical importance in assessing the impact of Bakke, is one on which reasonable persons could differ. Analogous questions have arisen under Title IX of the Education Amendments of 1972, which bars sex discrimination in federally funded programs. The answers are not yet clear. But if Title VI is accorded a narrow application, the underlying constitutional issue will have to be faced by public institutions, while private colleges and universities will apparently be free to initiate racial quota admissions policies in connection with programs that are not federally funded. The Court also left unresolved the issue whether there is a private right of action available under Title VI.

(2) Affirmative action admission programs of many differing types may well be valid under Bakke. Indeed, one of

the major principles that emerges from the several opinions of the justices is that the informed discretion of academic officers in assessing the relative qualifications of students will be accorded substantial deference by the courts, even though those judgments may be subjective and may weight the various factors considered in a differential manner. In effect, Bakke seems to suggest a judicial tolerance for more discretion and less rigidity in the admissions process, thus paving the way for imaginative and more flexible approaches short of strict racial quotas.

(3) If an institution wishes to adopt a racially sensitive admissions program, it must be prepared to articulate the precise manner in which the structure and criteria used serve the stated objectives of the program. Justice Powell rejected three of the objectives advanced for the Davis special admission program -- namely (a) increasing the proportion of minorities in the medical profession; (b) offsetting the effects of societal discrimination against designated minorities; and (c) increasing the number of physicians practicing in underserved communities. He accepted only the educational diversity objective as a permissible one. His opinion, however, is not that of the Court, and other objectives, if properly supported by persuasive evidence, might well carry the day in other cases, especially if they are supported by findings of

fact and need made by duly constituted legislative or administrative agencies.

(4) Bakke appears to suggest that the greatest opportunity for vigorous affirmative action programs lies in legislative hands. The Brennan group of four on the Court clearly supported the propriety of quota-type plans adopted by responsible educators and designed to redress past discrimination, either institutional or societal. Justice Powell refused to go this far, but he explicitly recognized that even quota-type admission programs might be permissible if they emerged from properly structured administrative, legislative, or judicial findings of illegal past discrimination. Such findings may well have evidentiary support in many cases. Justice Powell's concern, it seems, is related not so much to the absence of supporting proof (after all, societal discrimination generally provides the milieu for legal discrimination); rather it relates to the need, in his view, to assure a focussed consideration of the issues by a broadly representative body, a structured approach that will assure that the interests of majority group members are not overlooked in the zeal to redress injuries to victimized minority persons. As Justice Powell noted, "isolated segments of our vast governmental structure are not competent to make these decisions, at least in the absence of legislative mandate and legislatively determined criteria."

(5) Bakke provides a broad spectrum of possible institutional responses to the plight of the minority applicant to graduate and professional programs. At one extreme, a policy of indifference seems legally permissible; affirmative action in higher education -- as distinguished from nondiscrimination -- is not a legal obligation. At the other extreme, racial quotas, buttressed by statutory authorizations, broadly structured fact-finding processes, and clearly articulated findings supported by adequately marshalled evidence, appear capable of surviving judicial review. The intermediate ground is occupied by racially sensitive, flexible, multi-factored, affirmative action programs voluntarily developed and pursued, which emphasize the personal rather than the group characteristics of applicants. In determining the point on this spectrum at which particular institutional policies should be located, academicians should be mindful that inaction is likely to invite legislative reaction. The Congress which enacted Title VI could equally well mandate rigorous racially sensitive admissions programs which, in view of Bakke, would qualify for judicial authentication.

One other issue of major consequence, which underlies all of the other issues in Bakke, relates to our tendency in education to rely upon quantitative measures of qualities which, so far as we know, may actually be unquantifiable. Several studies, for example, appear to document the fact that the MCAT test, used

widely in medical school admissions practices, has little relevance to successful performance in the curriculum or in medical practice. Justice Douglas' dissent in the De Funis case marshalled evidence that suggests a measure of cultural bias associated with the Law School Admission Test. We desperately need, I suggest, better data on testing and evaluating academic qualifications and for assessing other important human qualities relevant to professional education and practice, such as creativity, motivation, integrity, perseverance, and compassion. Until such data are available, we must accept the challenge of Bakke: a good faith subjective evaluation of the total person of each candidate, without giving controlling significance either in a positive or negative direction to race or ethnicity, is regarded as a proper, reliable, and presumptively accurate description of acceptable affirmative action admission procedures.

Bakke has cleared the air a bit. The legal guidelines, while not fully defined, are less murky. The real challenge is what we will do, as educational leaders, in moving forward to advance the educational needs of those to whom equal opportunity has been denied in the past. As Justice Marshall's opinion in Bakke reminds us, ". . . meaningful equality remains a distant dream for the Negro. . . . In light of the sorry history of discrimination and its devastating impact on the lives of Negroes [and, I may add, of other minorities as well], bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will

forever remain a divided society."

George Bonham, editor of Change magazine, recently summarized the challenge of Bakke in these words:

> "What we must ultimately get to in this country, even if it takes another generation, is an open and honest exercise in the pursuit of both equal opportunities and the full expectation of equal performance and accomplishments. These twin yardsticks will ultimately measure the attendant risks and tranquillities of a society that has finally grown up, that practices what it preaches in its much cherished public documents. It is only simple justice, and if Bakke helps carry us even a step toward that end, it will have been worth all the hopes, realized or lost, that have been raised for it."